

1 The Honorable Marsha J. Pechman  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

YOLANY PADILLA, *et al.*,  
Plaintiffs-Petitioners,  
v.  
U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT, *et al.*,  
Defendants-Respondents.

Case No. 2:18-cv-00928-MJP

**COMBINED JOINT STATUS REPORT  
AND DISCOVERY PLAN**

1 Plaintiffs Yolany Padilla *et al.*, and Defendants U.S. Immigration and Customs  
 2 Enforcement *et al.*, by and through their counsel of record, hereby submit this Joint Status Report  
 3 and Discovery Plan pursuant to Federal Rule of Civil Procedure 26(f), Western District of  
 4 Washington Local Civil Rule 26(f), and the Court's Order dated March 6, 2019. *See also* Dkt.  
 5 32, 101.

6 **1. Statement of the Nature and Complexity of the Case:**

7 Plaintiffs' statement: This national class action suit challenges federal government  
 8 policies and practices excessively prolonging the detention of asylum seekers in expedited  
 9 removal proceedings by: (1) failing to promptly provide credible fear interviews and  
 10 determinations, and (2) after an asylum seeker's positive credible fear determination, failing to  
 11 provide timely bond hearings that comport with constitutional requirements. Plaintiffs assert  
 12 these failures violate the Administrative Procedure Act; the Due Process Clause of the Fifth  
 13 Amendment; and the Immigration and Nationality Act (INA) and its implementing regulations,  
 14 including 8 U.S.C. §§ 1225(b) & 1158, 8 C.F.R. §§ 235.3(b)(4), 208.30. Plaintiffs believe that  
 15 the Court can resolve most, if not all, of their claims on summary judgment.

16 Defendants' statement: This is a nationwide class action premised on Plaintiffs' ability to  
 17 prove that it is unconstitutional in any instance for the government to take longer than 10 days to  
 18 issue a credible fear determination, or seven days to conduct certain bond hearings. Because  
 19 Plaintiffs contend that no other fact—other than the length of time in custody—matter to the  
 20 legal question here, Defendants believe that the case presents a straightforward legal question  
 21 that should require only limited discovery. Defendants agree that, because this is a legal  
 22 question, it should be capable of resolution on summary judgment.

23 **2. Deadline for Joining Additional Parties:**

24 The Parties propose to add any and all additional parties by April 22, 2019.

25 **3. Assignment to a Magistrate Judge:**

26 The Parties do not consent to assignment of the case to a Magistrate Judge.

27 **4. Discovery Plan:**

1                   (A) Initial disclosures: The Parties exchanged initial disclosures November 5, 2018.

2                   (B) Subjects, timing, and potential phasing of discovery:

3                   The Parties agree to set the deadline for completion of fact discovery on November 20,  
 4 2019, but agree to set separate deadlines for expert disclosures and depositions. Namely, opening  
 5 experts' disclosures and reports due December 20, 2019, and rebuttal expert's disclosure and  
 6 report due January 19, 2020. Depositions of experts shall be completed by March 19, 2020.

7                   Plaintiffs' position: Plaintiffs anticipate conducting discovery, potentially to include  
 8 30(b)(6) depositions, on at least the following topics: Defendants' policies and practices  
 9 concerning the timing and scheduling of credible fear determinations for members of the  
 10 Credible Fear Interview class ("CFI Class"); Defendants' policies and practices concerning the  
 11 timing and scheduling of bond hearings for members of the Bond Hearing class ("BH class");  
 12 Defendants' policies and practices concerning bond hearing procedures; the impact that delays  
 13 and procedural deficiencies have on class members; and any relevant training materials  
 14 concerning the aforementioned policies and practices. Plaintiffs anticipate needing  
 15 approximately eight (8) months for discovery and, therefore, ask this Court to set the deadline for  
 16 completion of discovery on November 20, 2019. Plaintiffs do not believe that court-imposed  
 17 phasing of discovery would be appropriate.

18                   Defendants' position: Defendants anticipate conducting discovery, to include depositions  
 19 of class members and others who have submitted written testimony in this case. Defendants also  
 20 anticipate serving written discovery to investigate Plaintiffs' claims and to identify areas of  
 21 agreement between the parties. Defendants foresee significant difficulty in searching and  
 22 providing documentary information related to local practices and training materials on these  
 23 subjects as practices have the potential to vary in every area of responsibility for each of the  
 24 Defendant organizations. Because Plaintiffs argued for the certification of two nationwide class  
 25 based upon the existence of a national policy and have maintained that local differences in  
 26 practice are not relevant to the appropriate legal analysis, the value of local practice or training  
 27 information is proportionally very small as compared to the burden imposed by conducting a

1 nationwide search. Defendants therefore believe that eight (8) months of fact discovery is  
 2 sufficient only if the parties can work together to narrow the scope and minimize the burden of  
 3 the production requests. Defendants believe that concluding fact discovery before proceeding to  
 4 expert discovery is appropriate.

5       (C) Electronically stored information (ESI):

6       Plaintiffs' position: Plaintiffs anticipate that they will have little, if any, ESI to produce.  
 7 Plaintiffs anticipate, however, that Defendants may have substantial amounts of ESI to produce,  
 8 including database records. Plaintiffs propose that the Parties adopt the Western District of  
 9 Washington's Model Agreement Regarding Discovery of Electronically Stored Information in  
 10 Civil Litigation.

11       Defendants' position: Defendants anticipate that they may have some ESI to produce, but  
 12 believe that the bulk of the discoverable information will be in the form of published policies and  
 13 not documents found through key word searches. Defendants anticipate problems with electronic  
 14 searches, because using search terms in a case like this may result in very large numbers of non-  
 15 responsive documents. Documents identified in key word searches will require individual review  
 16 as the terms are certain to capture documents protected from disclosure by privilege, statute, or  
 17 regulation which prevent disclose of any information regarding persons found to have a credible  
 18 fear. Defendants are still in the process of investigating their ability to comply with the Model  
 19 ESI agreement at this time due to in part to some major changes that are happening with  
 20 Defendants' ESI and discovery systems, and are evaluating the most efficient way to produce  
 21 any relevant information. Defendants believe it would be more appropriate for the parties to  
 22 continue their discussions on this topic and separately submit a proposed ESI order setting out  
 23 each side's positions within 30 days.

25       (D) Privilege issues:

26       The Parties' position: If either Party discovers that it inadvertently produced privileged  
 27 information, the disclosing Party shall notify the receiving Party of the inadvertent disclosure and  
 28 the receiving Party will return the documents. This matter will be addressed in further detail in

1 the protective order that the Parties will file in anticipation of discovery production.

2       Defendants' addendum: Defendants are prevented, even under a protective order, from  
 3 releasing information related to an individual with a credible fear. Although we anticipate  
 4 agreeing to a claw back provision in the protective order, that provision will not relieve  
 5 Defendants of their statutory and regulatory obligations to individually review documents prior  
 6 to production.

7       (E) Proposed limitations on discovery:

8       Plaintiffs' position: Plaintiffs believe the Court should apply the limitations on discovery  
 9 imposed by the Federal Rules of Civil Procedure and Local Civil Rules.

10      Defendants' Position: Defendants propose limiting production requests to twenty-five  
 11 requests per side. Defendants also request that in responding to requests for production that the  
 12 responding party be permitted to serve objections within 30 days, and to begin production within  
 13 30 days of an agreement on appropriate search parameters. We believe these limitations to be  
 14 necessary due to the expected volume of documents and complexity of privilege review. Given  
 15 that this case concerns the policies and practices of Defendants, Defendants do not anticipate the  
 16 need to provide discovery regarding the substance of any individual alien's case or identity, and  
 17 that would in any case be protected by statute or regulation.

18       (F) The need for any discovery related orders: The Parties request a Rule 16(b)  
 19 Scheduling Order. They have agreed to the deadlines presented below.

<b>Discovery</b>	<b>Plaintiffs' Deadline</b>	<b>Defendants' Deadline</b>
Join additional parties	April 22, 2019	April 22, 2019
Amended pleadings	May 22, 2019*	May 22, 2019*
Completion of fact discovery	November 20, 2019	November 20, 2019
Completion of expert discovery	March 19, 2020	March 19, 2020
Dispositive motions	May 2, 2020	May 2, 2020
Motions in limine	30 days before trial	30 days before trial
Pretrial conference	2 weeks prior to trial	2 weeks prior to trial

28       Plaintiffs' addendum: if the Attorney General issues a decision in *Matter of M-S-*

1 purporting to eliminate the right to bond hearings for Bond Hearing Class members, such action  
 2 provides Plaintiffs with good cause pursuant to FRCP 16 to amend the scheduling order and the  
 3 complaint if the deadline for amending the complaint has past.

4

5. **The parties' views, proposals, and agreements, on items set forth in Local Civil Rule**  
**26(f)(1)**

6 (A) Prompt case resolution:

7       The Parties' position: The Parties remain willing to discuss possibilities for promptly  
 8 settling or otherwise resolving this case.

9 (B) Alternative dispute resolution:

10      The Parties' position: Neither Party can predict at this time whether trial will be  
 11 necessary, but the Parties believe that resolution by summary judgment is reasonably likely.  
 12 Therefore, at this time, they do not intend to utilize the Individualized Trial Program or an  
 13 Alternative Dispute Resolution option.

14 (C) Related cases:

15      The Parties position: Although some of the individual immigration cases of the named  
 16 Plaintiffs and many of the cases of class members are pending before the Executive Office for  
 17 Immigration Review, the Parties are aware of no related cases raising the claims in this action  
 18 pending before another federal or state court, or before an arbitrator.

19 (D) Discovery management:

20      The Parties' position: The Parties are willing to work together to manage discovery in a  
 21 way that will promote the expeditious and inexpensive resolution of the case. In particular, the  
 22 Parties will consider requesting the assistance of a magistrate judge for mediation and/or  
 23 settlement conferences. Neither Party agrees to forgo or limit depositions, exchange documents  
 24 informally, or use an abbreviated pretrial order. The Parties reserve the right to request  
 25 discovery and/or case management conferences with the Court.

26 (E) Anticipated discovery sought:

1       Plaintiffs' position: Plaintiffs anticipate conducting discovery, including 30(b)(6)  
 2 depositions, on at least the following topics: Defendants' policies and practices concerning the  
 3 timing and scheduling of credible fear determinations for members of the Credible Fear  
 4 Interview class ("CFI Class"); Defendants' policies and practices concerning the timing and  
 5 scheduling of bond hearings for members of the Bond Hearing class ("BH class"); Defendants'  
 6 policies and practices concerning bond hearing procedures; any relevant training materials  
 7 concerning the aforementioned policies and practices; and the impact of such policies and  
 8 practices on class members.

9       Defendants' position: Defendants anticipate conducting discovery, to include depositions  
 10 of class members and others who have submitted written testimony in this case. Defendants also  
 11 anticipate serving written discovery to investigate Plaintiffs' claims and to identify areas of  
 12 agreement between the parties. Defendants foresee tremendous difficulty in searching and  
 13 providing documentary information related to local practices and training materials on these  
 14 subjects as practices have the potential to vary in every area of responsibility for each of the  
 15 Defendant organizations. Because Plaintiffs argued for the certification of two nationwide class  
 16 based upon the existence of a national policy and have maintained that local differences in  
 17 practice are not relevant to the appropriate legal analysis, the value of local practice or training  
 18 information is proportionally very small as compared to the burden imposed by conducting a  
 19 nationwide search. Defendants therefore believe that the parties should work together to narrow  
 20 the scope and minimize the burden of the production requests.

22       (F) Phasing motions:

23       The Parties position: The Parties request the opportunity to file separate, or phased,  
 24 motions for summary judgment on each claim. Each count presents unique legal issues that may  
 25 be ready for adjudication at different stages of the case. In addition, the classes are represented  
 26 by different sets of individuals and have different sets of undisputed facts that will be relevant to  
 27 the adjudication of the claims. The issues can be more clearly addressed in distinct motions.

28       (G) Preservation of discoverable information:

1 Defendants have implemented litigation holds at each of the relevant agencies.

2 (H) Privilege issues:

3       The Parties' position: If either Party discovers that it inadvertently produced privileged  
 4 information, the disclosing Party shall notify the receiving Party of the inadvertent disclosure and  
 5 the receiving Party will return the documents. This matter will be addressed in further detail in  
 6 the protective order that the parties will file in anticipation of discovery.

7       Defendants' addendum: Defendants reiterate that in addition to privileged material, there  
 8 will likely be material that is protected by statute or regulation, and a protective order and/or  
 9 clawback agreement would not relieve Defendants of their obligation to prevent the disclosure of  
 10 such protected information.

11 (I) ESI:

12       Plaintiffs' position: Plaintiffs anticipate that they will have little, if any, ESI to produce.  
 13 Plaintiffs anticipate, however, that Defendants may have substantial amounts of ESI to produce.  
 14 Plaintiffs propose that the Parties adopt the Western District of Washington's Model Agreement  
 15 Regarding Discovery of Electronically Stored Information in Civil Litigation.

16       Defendants' position: Defendants anticipate that they may have some ESI to produce, but  
 17 believe that the bulk of the discoverable information will be in the form of published policies and  
 18 not documents found through key word searches. Defendants anticipate that electronic searches  
 19 using search terms likely will result in very large numbers of non-responsive documents, which  
 20 will require individual review to capture documents protected from disclosure by privilege,  
 21 statute, or regulation protecting disclose of any information regarding persons found to have a  
 22 credible fear. At this time, Defendants are still in the process of investigating their ability to  
 23 comply with the Model ESI agreement due to in part to some major changes that are happening  
 24 with Defendants' ESI and discovery systems, and are evaluating the most efficient way to  
 25 produce any relevant information. Defendants believe it would be more appropriate for the  
 26 parties to continue their discussions on this topic and separately submit a proposed ESI order  
 27 setting out each side's positions within 30 days.

1                   (J) Alternatives to Model ESI Agreement:

2                   The Parties' position: The Parties agree that because Defendants are in the process of  
3 migrating systems and understanding their limitations, Defendant request that the parties  
4 continue discussions and submit a proposed ESI order within 30 days.

5                   **6. Date of completion of discovery:** November 20, 2019, with the exception of Expert  
6 discovery, which will be completed by March 19, 2020.

7                   **7. Bifurcation of trial or other issues:**

8                   The Parties' position: The Parties submit that the case is not amenable to bifurcation at  
9 this time.

10                  **8. Whether to dispense with, in whole or in part, pretrial statements and pretrial order  
11 called for by Local Civil Rules 16(e), (h), (i), and k, and 16.1 for the sake of economy:**

12                  The Parties' position: The Parties do not wish to dispense with the pretrial statements  
13 and orders called for by the aforementioned Local Rules.

14                  **9. Other suggestions for shortening or simplifying the case:**

15                  The Parties' position: The Parties do not have any suggestions for shortening or  
16 simplifying the case at this time, but will work cooperatively to identify such opportunities,  
17 including the possibility of stipulating to any undisputed facts.

18                  **10. Date case will be ready for trial:** September 14, 2020

19                  **11. Trial by jury or non-jury:** Non-jury.

20                  **12. Number of trial days required:** Five (5) to ten (10) days.

21                  **13. Names, addresses, and telephone numbers of all trial counsel:**

22                  Plaintiffs' trial counsel: Matt Adams, Leila Kang, Aaron Korthuis, Northwest Immigrant  
23 Rights Project, 615 Second Ave., Ste. 400, Seattle, WA 98104, (206) 957-8611; Trina Realmuto,  
24 Kristin Macleod-Ball, American Immigration Council, 1318 Beacon Street, Suite 18, Brookline,  
25 MA 02446, (857) 305-3600.

26                  Defendants' trial counsel: Lauren C. Bingham, PO Box 868, Ben Franklin Station,  
27 Washington, DC 20044 (202) 616-4458); Sarah Wilson, 1801 4<sup>th</sup> Avenue North, Birmingham,  
28

1 AL 35203 (205-244-2140).

2 **14. Dates on which trial counsel may have complications:** We are not currently aware of  
3 any trial-date conflicts.

4 **15. Service:** Plaintiffs, through their counsel, have effectuated service on all Defendants.

5 **16. Request for a scheduling conference prior to entry of a scheduling order:**

6 The Parties' position: The Parties do not request a scheduling conference prior to entry  
7 of a scheduling order.

8 **17. Date(s) by which all nongovernmental corporate parties filed their disclosure**

9 **statement:** There are no nongovernmental corporate parties in this case at this time.

10 DATED this 20th day of March, 2019.

<p>11 <i>Attorneys for Plaintiffs and Class Members:</i></p> <p>12 <u>s/Matt Adams</u>, WSBA No. 28287  13 <u>s/Leila Kang</u>, WSBA No. 48048  14 <u>s/Aaron Korthuis</u>, WSBA No. 53974</p> <p>15 Northwest Immigrant Rights Project  615 Second Ave., Ste. 400  16 Seattle, WA 98104  (206) 957-8611  17 (206) 587-4025 (fax)</p> <p>18 <u>s/Trina Realmuto</u>, admitted <i>pro hac vice</i>  19 <u>s/Kristin Macleod-Ball</u>, admitted <i>pro hac vice</i></p> <p>20 American Immigration Council  1318 Beacon Street, Ste. 18  21 Brookline, MA 02446  (857) 305-3600</p>	<p>11 <i>Attorneys for Defendants:</i></p> <p>12 JOSEPH H. HUNT  Assistant Attorney General</p> <p>13 WILLIAM C. PEACHEY  Director</p> <p>14 EREZ REUVENI  Assistant Director</p> <p>15 <u>s/ Lauren C. Bingham</u>  LAUREN C. BINGHAM, Fl. Bar # 105745  Trial Attorney  U.S. Department of Justice  Civil Division  Office of Immigration Litigation  District Court Section  P.O. Box 868  Ben Franklin Station  Washington, DC 2004  Telephone: (202) 616-4458  Fax: (202) 305-7000  Email: Lauren.C.Bingham@usdoj.gov</p> <p>16 SARAH S. WILSON  Assistant United States Attorney</p>
28	